No. 88-1503

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NANCY BETH CRUZAN, BY HER PARENTS AND CO-GUARDIANS, LESTER L. AND JOYCE CRUZAN,

Petitioners,

v.

DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, AND ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,

Respondents,

v.

THAD C. MCCANSE, GUARDIAN AD LITEM,

Respondent,

On Writ of Certiorari to the Missouri Supreme Court

BRIEF OF J. G. MORRISS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE ON BEHALF OF RESPONDENT

Amicus hereby respectfully moves for leave to file a brief amicus curiae in the present case. Requested consent of the parties is expected but has not yet been received and filed. When filed, it will make this motion unnecessary.

INTEREST OF AMICUS CURIAE

Jerry Morriss, age about 80 has an experience something like Nancy Cruzan. He was injured in an auto accident and remained unconscious for a substantial time. He lost an eye. His nose was cut off. He suffered upper and lower jaw fractures, multiple skull fractures, a broken arm, an injured hip later requiring a full hip replacement and a broken ankle. His doctor apparently said he had suffered other injuries that were not diagnosed because of the number of

injuries that were diagnosed. Unlike Nancy Cruzan, Morriss came out of his coma/persistent vegetative state. He has certain of the other insults to body typical of old men such as arthritis, heart problems, cancer, a cataract and glaucoma in his remaining eye, prostrate, etc. He believes that he might be dead now if any "reasonable" person had had the power to exercise substituted judgement on his "behalf" to protect his "right to privacy in order to die".

He wishes to assure the court that he would not wish his problems on anyone, but in spite of his problems, he believes himself more happy than the average American. He would, of course, gladly decline to have his handicaps is given the opportunity, but believes that happiness and quality of life are far more a function of a person's personality

and relationships with others than the person's health. He further believes that if asked in advance if he might not rather be dead than in his condition, without knowing his present attitude, it would have been impossible for him to understand his present contentment and happiness so as to make an informed decision. He believes substituted judgement suffers from serious defects and should not be used in the present case, based on his experience and the arguments herein.

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SUMMARY OF ARGUMENT

In recent years, courts have encountered, with increasing frequency, requests for permission to withhold life-supporting medical treatment from incompetent individuals. Many courts have employed the doctrine of substituted judgement in handling these requests. This article critically examines the theoretical basis and the practical operation of the substituted judgment standard.[1] The article concludes that the standard suffers from theoretical incoherence and practical unworkability, and facilitates the exploitation and abuse of incompetent individuals.

Reversing would require finding unconstitutional the laws of all states.

[1]Any standard for choosing whether to withhold treatment from an incompetent necessarily involves a substitute decision, since the patient by definition cannot legally decide.

The Legal Context of the Substituted Judgment Doctrine

The substituted judgment doctrine derives its analytical framework largely from the law governing the rights of competent patients. Therefore, a brief overview of this latter area of law will facilitate an understanding of both the origin of the modern substituted judgment doctrine, and the analytical perspective with which judges, advocates, and scholars typically view the standard.

Routine medical treatment decisions typically do not come before the court for legal scrutiny, even when the patient and practitioner dispute the proper or desirable course of treatment. The patient either accepts the prescribed treatment, or modifies it in accordance with his tastes. While the possibility of death would presumably

motivate a more scrupulous adherence to the physician's recommendations, even in life-or-death cases the patient's unilateral decision to accept or reject a certain treatment will prevail, as long as the patient has practical control over his own care.

A different situation arises, however, when the individual does not possess full responsibility for his or her own caretaking and wellbeing. A patient in a hospital or prison, for example, does not possess the same degree of freedom to disregard prescribed treatment as does a patient dwelling independent of supervising medical authorities. The environment of shared care both entails (or reflects) substantial restrictions on patient behavior and imposes special obligations on the caretaker to assure patient cooperation (and, hence, further

restrict patient behavior). The consequent increase in potential patients-caretaker friction sets the stage for legal clashes over medical decisions.

In dealing with the litigation of such patient-physician treatment disputes, courts have formulated a right to refuse treatment, including life-saving treatment[2] with limited exceptions.[3] This right provides the institutionalized or otherwise restricted individual with a de jure power to disregard doctor's orders, which matches the de facto power already possessed

[2]See,e.g., Lane v. Candura, 6 Mass. 377,376N.E. 2d 1232(Mass. App. 1978), refusal to authorize amputation of gangrenous leg. See generally Byrn, Compulsory Lifesaving Treatment for the Competent Adult, in DEATH, DYING AND EUTHANASIA 706(D. Horan & D. Mall eds. 1980)[hereafter cited as Byrn].

[3]See,e.g., Comm'r of Corrections v. Myers; Application of the President and Directors of Georgetown College, 331 F.2d 1000D.C. Cir. 1964), blood transfusion ordered over religious objections, for mother of small child. See also Jefferson v. Griffin Spalding County Hosp. Auth.,247 S.E.2d 457(1981), court order of Caesarian section upheld, over woman's religious objections.

by patients not subject to such behavioral restrictions. The caretaker, meanwhile, benefits from an absolution of legal liability for patient decline or demise due to noncompliance with the prescribed treatment.[4]

The right to refuse treatment ordinarily requires patient exercise. Thus, when the patient does not possess the legal competency to reject courses of treatment, caretakers cannot rely upon patient consent to avoid legal liability for withholding such treatment.

[4]Of course, the treating physicians may still feel a moral compulsion to preserve the life of the patient. In at least two major life-or-death treatment cases, In re Quinlan, 70 N.J. 10,355 A2d 647 (1976) cert denied, 429US. 922(1976), and In re Spring, 380 Mass. 629, 405 N.E.2d 115(1980), the courts authorized the withdrawal of life-support systems, but the physicians continued treatment against the wishes of the family members who brought the litigation. J.QUINLAN, J.QUINLAN & P BATTELLE, KAREN ANN: THE QUINLANS TELL THEIR STORY. C.f. the case of David G, discussed in R. BURT, TAKING CARE OF STRANGERS 1-21(1979)[hereafter cited as Burt], burn treatment administered contary to patient's requests.

Therefore, the parties bearing responsibility may administer treatment they feel is inappropriate, simply to avoid the threat of liability for treatment decisions subsequently judged improper.

The paradigmatic case involves a decision whether to discontinue, or refrain from initiating, a mode of therapy which will maintain the life of the incompetent for an indefinite period, but which will not effect a cure. Dialysis, respirators, and often cancer therapies fall into this category. Treatment may be painful and expensive, with perhaps an uncertain prognosis for even maintaining life. Failure to treat, however, will result in accelerated or immediate death. Thus, relatives, guardians, institutional administrators, or other caretakers seek the opinion of a court as to the extent of their obligations and options with

respect to the patient.

Prior to the advent of high-technology health care, medical decisions for incompetents were determined in accordance with the perceived best interests of the patient, which ordinarily meant the administration of all treatment modalities necessary to preserve life. Of late, however, the notion has gained force that some treatments might not be preferable to hastened death.[5] The prospect of incapacitation, dependency on machines, or unattractive or painful side effects has led some individuals to refuse modern life-prolonging measures. Family caretakers of incompetents undergoing such therapies face additional incentives for

[5]See,e.g., In re Conroy,188 N.J. 523, 529-30, 457 A.2d 303 (App. Div. 1983), rev'd, 98 N.J. 321, 486 A.2d 1209 (1985), wrong to keep gravely ill, incompetent eighty-four year old woman alive.

refusing treatment for their wards, including the prospects of demanding maintenance duties, considerable financial sacrifice, and witnessing the gradual deterioration of a loved one. Together these factors provide sufficient motivation for some caretakers to seek the cessation or withholding of life-sustaining treatment for their incompetent wards.

The possibility of legal liability, however, remains a great enough threat that caretakers and physicians may be reluctant to pursue nontreatment without an advance guarantee of immunity. Hence, caretakers fo incompetents have sought to construct an acceptable legal case for nontreatment to serve as the basis for an advance declaratory judgment.

The traditional best interests standard does not obviously supply an access-

ible legal route to nontreatment: it is far from intuitive that death can be in one's best interests.[6] Especially in light of the potential conflicts of interest[7] between the caretaker and the ward, the court may be expected to look unfavorably upon a contention that the ward would be better off dead than alive.[8] In an exercise of legal creativity, then, advocates seeking to formulate a respectable argument for the nontreatment of incompetents have seized upon the doctrine of substi-

[6]See Comment, The Right to Die and Substituted Judgment in Texas, 18 HOUS. L. REV. 851,871-73,877(1981)[hereinafter cited as Comment].

[7]See Kindregan, The Court as Forum For Life and Death Decisions: Reflections on Procedures for Substituted Consent, 11 SUFFOLK U.L. REV. 919,933(1977)[hereinafter cited as Kindregan].

[8]"As the theologian Dr. John Fletcher has stated, '[w]henever a strong group argues on behalf of a weaker group that their removal would be better than their survival, we should not be duly impressed.'" Schultz, Seartz & Appelbaum, Deciding Right-to-Die Cases Involving Incompetent Patients: Annas v. Saikewicz, 11 SUFFOLK U.L. REV. 936,942n.27(1977)[hereafter cited as Schultz](citation omitted).

tuted judgment.[9]

While the limits and nature of substituted judgment vary somewhat from case to case, the approach essentially envisions a court as acting on behalf of an incompetent in the same manner as the incompetent would if he were competent.[10] The notion that a court could act in this fashion first appeared in an early English case, Ex parte Whitbread in re Hinde, a Lunatic.[11]

[9]See Annas, Reconciling Quinlan and Saikewicz: Decision Making for the Terminally Ill Incompetent, 4 AM.J.L.&MED.367,377n.30(1979)[hereinafter cited as Annas]:

> Probably the primary reason for adopting the "substituted judgment" over the "best interests" test...was that very good arguments can be mustered to demonstrate that continued treatment was actually in the best interests of [the patients]. To the extent that this is true, it is another example of the old adage that "hard cases make bad law".

[10]See,e.g., Strunk v. Strunk, 445 S.W. 2d145, 147(Ky.1969). See generally Robertson, Organ Donations by Incompetents and the Substituted Judgment Doctrine, 76 COLUM.L.REV. 48(1976)[hereinafter cited as Robertson].

[11]35 Eng. Rep. 878(1816). The first American case to employ the substituted judgment approach, In re Willoughby, a Lunatic, 11 Paige Ch. 257(N.Y. Ch. 1844), like Whitbread involved a petition for an allowance out of an incompetent's estate.

This case involved a petition for an allowance to be drawn from the surplus estate of an insane person and used to support that person's near relatives. Lord Chancellor Eldon, in discussing the matter, proclaimed that "the Court will not refuse to do, for the benefit of the Lunatic, that which it is probable the Lunatic himself would have done."

For the Whitbread Court, no distinction existed between the best interests standard, the reasonably prudent person standard, and the substituted judgment approach. But advocates seeking to use the substituted judgment standard to permit nontreatment, which the best interests standard traditionally would not allow, must do away with this Whitbread identity of standards. Attorneys and thus courts achieved this by offering an independent rationale for substi-

tuted judgment-the preservation of rights.[12] By means of a subtle shift in reasoning from the protection of interests to the protection of rights, courts found themselves employing a doctrine which both allowed medical decisions contrary to the patient's best interests[13] and which elevated

[12] See,e.g., In re Moe, 385 Mass. 555, 565, 432N.E.2d 712, 720(1982), substituted judgment protects rights of incompetent.

[13] See,e.g., Guardianship of Roe, 383Mass.415, 421N.E.2d 40,59-60n.20(1981):

> If the judge feels that the "best interests" of the ward demand one outcome but concludes that the ward's substituted judgment would require another, then, in the absence of an overriding State interest, the substituted judgment prevails. In short, if an individual would, if competent, make an unwise or foolish decision, the judge must respect that decision as long as he would accept the same decision if made by a competent individual in the same circumstances.

See also Robertson, supra note 22, at 65; Cantor, Quinlan, Privacy, and the Handling of Incompetent Dying Patients, 30 RUTGERS L. REV. 243,259-60 (1977)[hereinafter cited as Cantor].

The separation of the best interests and substituted judgment standards is not always clear or complete. Thus one apparently confused court conceded the diference between the two standards, noting that "[i]n utilizing the [substituted judgement] doctrine the court does not decide what is necessarily the best decision," yet in the very next paragraph the same court denied the difference between the standards

such decisions to constitutional status.[14]

Theoretical Aspects and Difficulites

The key to this legal maneuver lies in the depiction of the issue as one of decisional rights.[15] Under the best interests standard, the court clearly takes responsibility for the decision: it decides because the incompetent cannot. This basic reality vanishes with substituted judgment, however, in favor of a powerful fiction: the incompetent decides, and the court merely acts as a mouthpiece or interpreter. Suddenly all responsibility for the decision rests with the incompetent, and the court and litigants become blameless, choiceless assistants. The courts further impair their own ability critically to examine the substituted judgment standard when they unquestioningly assume that any such challenge would threaten the "rights" of the incompetent.[16]

by maintaining that "the use of the doctrine of substituted judgment promotes best the interests of the individual." In re Moe, 432N.E.2d at 720.

[14] E.g., Severns v. Wilmington Medical Center, 421 A.2d1334,1347(Del. 1980). Some cases base their decisions on a common-law right to refuse treatment. E.g., In re Colyer, 99Wash.2d114,121-22,660P.2d738,741(1983). See Note, Live or Let Die; Who Decides an Incompetent's Fate? In re Storar and In re Eichner, 1982B.Y.U.L.REV.387,390-92[hereinafter cited as Note]. See generally D. Horan & E. Grant, Prolonging Life and Withdrawing Treatment: Legal Issues, AUL STUDIES IN LAW AND MEDICINE. (No.15,1983)(publication of Americans United for Life). These holdings theoretically could be overturned by statute, thus forcing the constitutional issue.

[15] "To protect the incompetent person within its power, the State must...afford to that person the same panoply of rights and choices it recognizes in competent persons." Superintendent of Belchertown State School v. Saikewicz, 373 Mass.738,746,370N.E.2d417,428(1977).

[16] See,e.g., In re Moe, 432N.E.2d at 720:

To speak solely in terms of the "best interests" of the ward, or of the State's interest, is to obscure the fundamental issue: Is the State to impose a solution on an incompetent based on external criteria, or is it to seek to protect and implement the individual's personal rights and integrity?

But cf. Conservatorship of Valerie N., 152 Cal. App. 3d224,199 Cal. Rptr. 478(1984), statute prohibiting court authorization of sterilization of incompetents survives strict due process and equal protection scrutiny.

Once the court embraces this paradoxical notion-that a person legally unable to decide may nonetheless exercise decisional rights, albeit with the court's assistance-the substituted judgment doctrine necessarily becomes the only acceptable approach to treatment decisions for incompetents. Competing decisional standards can no longer find judicial favor, since they concede the failure or nonexistence of the personal right to decide medical treatment. The best interests standard, for example, empowers the court to decide for itself what is best for the incompetent. The court acts as a parent, and thus places the patient in the status of an infant, with rights accordingly reduced.[17] Likewise, the

[17]See,e.g., In re Storar, 52N.Y.2d363,380,420 N.E.2d64,73,438,N.Y.S.2d266,275(1981), cert. denied, 454U.S.858(1981), rights of congenital incompetent are those of infant.

reasonable man standard disregards the individual's inscrutable subjective intent: the incompetent's choice is patterned after the idealized, objective standard of the reasonably prudent person. Appointment of an authorized surrogate, another option, admittedly substitutes another's will for the incompetent's. Relying wholly upon the physician means totally denying the existence of a patient decision. These alternative standards may purport to capture the purposes and policy of the right,[18] but they cannot deny the absence of a purely personal choice.[19] Only substituted judgment claims to

[18]See,e.g., In re Grady, 85N.J.235,250,426 A.2d467,474(1981), best interests standard protects constitutional interests.

[19]The best interests and reasonable man standards disallow, for example, the possibility of a foolish decision, a possibility generally within one's rights. Courts and commentators universally overlook the absurdity of making a foolish decision-intentionally-on behalf of another.

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retain intact the personal right.[20]

The critical theoretical flaw of substituted judgment, however, lies precisely herein: while the standard claims to preserve a purely personal right, the exercise of this right requires the importation of a third party-the court-to make the decision how the right wil be exercised. Such vicarious exercise of a personal, decisional right fundamentally conflicts with the integrity of the right.[21] The right to vote, for example, inheres in all adults by constitutional decree but the exercise of this right by another constitutes an abuse, indeed a crime, whether the first person be competent

[20]Buchanan, The Limits of Proxy Decisionmaking for Incompetents, 29 UCLA L.REV.386,387,403 (1981)[hereinafter cited as Buchanan].

[21]In re Guardianship of Eberhardy, 102 Wis. 2d539,566,307N.W.2d881,893(1981),"[substituted judgment decision] clearly is not a personal choice, and no amount of legal legerdemain can make it so."

or incompetent. Similarly, the delivery of a public speech, the selection or divorce of one's spouse, and the publication of a periodical all involve important personal rights whose coherence and essence hinges upon their strict personal use.[22] Indeed, the very purpose of the declaration of such rights is the forestalling of their usurpation by third parties.

The right which substituted judgment doctrine seeks to safeguard in treatment cases, like the right to vote and the right to free speech, does not lend itself to vicarious exercise. The right to refuse medical treatment represents a part of the constitutional protection

[22]In re Jennings, 187N.J. Super. 55,58,453 A.2d 572,574(Ch. Div. 1981), "most courts have viewed the decision to seek a divorce as so strictly personal that they do not permit it to be made by anyone acting in a representative capacity."

of autonomous self-determination entailed in the judicially inferred right to privacy. Since the privacy right protects personal decisions against government intrusion, judicial intervention to decide medical treatment in the name of patient privacy rights is singularly inappropriate.[23] The privacy right provides, not that a

[23]See Schultz, supra note, at 956, "[the incompetent] necessarily has to have a decision made for him. Thus, the most fundamental interest encompassed by the right to privacy is not involved in these [cases]"; Note, In re Quinlan: Defining the Basis for Terminating Life Support Under the Right of Privacy, 12 TULSA L.J. 150,167 (1976)[hereinafter cited as Note, In re Quinlan], "(t)he patient's right of privacy provides a zone of protection for the exercise of choice by the patient. The judicially sanctioned entrance of third parties into this zone is not justified by the privacy rationale." See also In re Guardianship of Eberhardy, 307 N.W.2d at 893, "[w]e find it somewhat too facile when discussing the right of privacy, which by definition necessarily refers to the person involved, to find that there is a genuine choice when that choice cannot be personally exercisable."; Note, The Tragic Choice: Termination of Care for Patients in a Permanent Vegetative State, 51N.Y.U.L.REV.285,293-95(1976)[hereinafter cited as Note, The Tragic Choice], importance of competency to assertion of privacy rights.

decision be made, but rather that the individual be free to choose or not to choose some personal course of action, ie. substituted decisions are the opposite of privacy.

The requirement of strictly personal exercise of decisional rights has special significance for incompetents: being unable to decide, they cannot contest decisions made in their behalf. Moreover, the notion of third party exercise of personal rights knows no bounds:[24] anything a competent person may do in the exercise of protected rights, an incompetent might be "substitute judged" to do, whether it be the noble donation of an organ[25] or the

[24]Nor need the substitute exercise of rights be intelligent, prudent, or selfrespecting. See supra note 13.

[25]Compare Strunk v. Strunk, 445S.W.2d145(Ky. 1969), authorizing kidney donation from retardate, with In re Guardianship of Pescinski, 67Wis.2d 4,226N.W.2d 180(1975), refusing to authorize kidney donation from catatonic schizophrenic. See generally Robertson, supra note 10.

self-mutilation of sterilization.[26] Futhermore, with the decriminalization of suicide comes the possibility that society's unwanted will be "allowed" the exercise of their rights in this area.[27]

This is not to say that incompetents

[26]"It is difficult to think of an experience more degrading to human dignity than a sterilization ordered by a judge who is empowered by the court to read the heart and mind of the incompetent ward and forever bar the ward from bringing forth a child." In re Moe, 432N.E.2d at 724(dissenting opinion).

[27]See Burt, supra note 4, at 170:

[The] same...impulse...leads from authorizing the death of comatose people to retarded people already suffering from terminal physical illness to retarded people suffering only from retardation. It can lead from old people who have become too burdensome to sustain to anomalous newborns whose sustenance is too burdensome to anticipate. . . Robertson argues in 1976 that substituted judgment doctrine "is unlikely to support decisions in favor of passive euthanasia of defective newborns or the chronically vegetative." Robertson, supra note 10, at 77(footnotes omitted). Accord, Clarke, supra note 12, at 825-26, "[i]t is unlikely that personal constitutional rights will ever support the withholding of necessary life-saving treatment from minors and incompetents." But see In re Quinlan, 355A.2d647; In re Storar, 420 N.E.2d 64; Leach v. Akron Gen. Medical Center, 68 Ohio Misc.1,426N.E.2d809(1980); In re Colyer, 660P.2d738; Severns v. Wilmington Medical Center, 421A.2d1334; Custody of a Minor, 385 Mass.697, 434N.E.2d601(1982).

should not have or do not have any rights; it so only to acknowledge that the incompetent has special needs and faces special circumstances.[28] The law accommodates these special features by providing, for example, contracts made by incompetents are voidable.[29]

[28]The problem arises, not from the allowance of rights to incompetents, but from the abuse of decisional rights. Courts need to recognize that, while incompetents have rights, some simply cannot be exercised. In re Jennings, 453A.2d at 574, "Lawrence Jennings alone has the right to make this decision. The unfortunate fact that he lacks, and will always lack, the capacity to make it does not justify delegating that decision to someone else." This incident of incompetency represents reality, not legal injustice. Hence any judicial effort to superimpose the intelligentexercise of decisional rights is misconceived. See id. at 576:

In some respects, this case turns more on the limitations of judicial power than upon other concepts. There are many real problems, many sad problems, confronting the parties in this case. Most of those problems simply are not susceptible to being resolved by legal decisions rendered by a judge. Courts are increasingly asked to come up with solutions to intractable personal and social problems. Sometines the best thing a judge can do is admit his inability to help.

[29]See,e.g., Schmaltz v. Walder, 566S.W.2d81(Tex. Civ. App. 1978); see generally 41 AM.JUR.2d Incompetent Persons §§ 66(1968).

The contract is not binding until ratified by a competent person, not because the incompetent has no right to contract, but because the state seeks to protect the exercise of this right against abuse by others. When incompetent, an individual may more easily succumb to external influences, which the law considers coercive or manipulative; hence, the law applies strict safeguards to the exercise of rights.

Substituted judgment, however, disposes of these precautionary measures by creating a fictional competency. Individual decisionmaking powers, according to the doctrine, somehow retain their full force even when the very definition of incompetency indicates the contary. Consequently third parties, whom the law previously excluded to protect the incompetent, now must actively help the court formulate a decis-

ion to be attributed to the incompetent patient. Under substituted judgment doctrine, undue influence metamorphoses into valuable support for the incompetent's rights.

Practical Aspects and Difficulties

The problematic applicability of privacy rights to incompetents represents only one major source of difficulties for the substituted judgment doctrine. Another whole set of questions arises from the simple attempt to put the standard into operation. These questions center around the ascertainment of the incompetent's intent, an intent which is by definition unknowable.[30]

Courts have managed to simplify

[30]See In re Conroy, 486A.2s at 1229, "(s)ince the condition of an incompetent patient makes it impossible to ascertain definitively his present desires, a third party acting on the patient's behalf often cannot say with confidence that his treatment decision for the patient will further rather than frustrate the patient's right to control his own body."

the task of discovering the incompetent's would-be intent by adopting a straightforward assumption:[31] what the person decided, or would have decided, before, corresponds to what the person would decide now. Thus, where the patient previously considered the medical treatment question, and clear evidence of the person's prior resolution appears, the court simply applies this prior resolution to the decision at hand.

The New York Court of Appeals did precisely this in In re Eichner.[32] Brother Fox, an eighty-three year old in a permanent vegetative state,[33] was sustained by an artificial respira-

[31] Problems with this assumption are discussed infra.

[32] Inre Storar, 420N.E.2d64.

[33] A person in a "vegetative state" retains certain basic involuntary neurologic functions, such as regulation of heart rate and body temperature, but has no capacity for cognitive or sapient functioning. In re Quinlan, 355A.2d at 654-55.

tor. Before lapsing into this state, however, Brother Fox had participated in serious discussions about the famous Karen Quinlan case. At these discussions Fox made it clear that were he to arrive at such a stage, he would desire removal of the respirator. The court found these statements to be sufficiently serious as to warrant a substituted judgment in favor of removing the respirator.

Such strong evidence as solemn prior statements only rarely appears in these cases, however. A much more frequent (and practically difficult) case for the application of substituted judgment doctrine involves a person, once competent, who made no explicit advance resolution regarding life-support systems or treatment. The classic example of this type of case, In re Quinlan,[34]

[34] 355 A.2d647.

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involved a twenty-two year old woman in a chronic vegetative state. The New Jersey Supreme Court, reviewing a petition for authority to discontinue the use of a respirator, possessed no hard evidence of Karen Quinlan's prior feelings about the matter.[35] The court, nonetheless, granted the petition on the dual grounds that, first, her father, the petitioner, as a close family member, was well-qualified to determine what Karen would choose, and second, "the overwhelming majority" of people would, in similar circumstances, choose discontinuance of the respirator.[36] When

[35] Evidence of prior statements appeared in the record, but the court dismissed these as "remote and impersonal, lack[ing] significant probative weight." Id. at 653.

[36] Id. at 664. There is no indication of evidence in the record as to what the majority of people would choose, and thus this apparently was a matter of judicial notice. A meticulous court, following Quinlan, might wish to order the undertaking of a few thorough polls.

Yet such talk of majority sentiment runs counter to a grounding of these decisions in

the patient in herently differs in important respects from the majority, however, the relevance of majority sentiments is drastically limited.[37] Thus, when the incompetent has never

the theory of rights. Rights exist precisely to enable the individual to act independent of majority views. Even if "overwhelming majority" is taken to mean unanimity, the Quinlan rule cuts back on the theory of rights by disallowing the possibility of a new and different decision. See In re Conroy, 486A.2d at 1229, "(t)he question is not what a reasonable or average person would have chosen to do under the circumstances but what the particu larpatient would have done.."

Viewed as simply an evidentiary aid wholly independent of the rights framework of substituted judgment, the Quinlan majority-sentiment rule appears helpful only on a statistical basis. As such, it cannot serve to justify a conclusion about an individual. See, e.g., Smith v. Rapid Transit, Inc., 317 Mass. 469, 58N.E.2d754(1945), only one bus line passed point of accident insufficient evidence of bus company's respnsibility; People v. Collins, 68 Cal. 2d319, 438P.2d33, 66 Cal. Rptr. 497(1968), probabilistic evidence based on characteristics of defendents rejected.

[37] Superintendent of Belchertown State School v. Saikewicz, 370N.E.2d at 429:

Evidence that most people would or would not act in a certain way is certainly an important consideration in attempting to ascertain the predilections of any individual, but care must be taken, as in any analogy, to ensure that operative factors are similar or at least to take notice of the dissimilarities.

been competent, because congenitally insane or retarded, the court can no more look to polls for answers than it can look to the response of a random individual. Nor may the court reasonably expect to extract a legally valid intent from the mind of one whose mental processes have always been largely beyond the comprehension of the observer. The congenital incompetent,

> by definition, has never been capable of formulating a legally binding intent. Ironically, courts have made the most significant extensions of the substituted judgment doctrine in cases involving life-long incompetents.[38]

The seminal Saikewicz case[39] is exemplary.

[38]See Strunk v. Strunk, 445S.W.2d1445, substituted judgment extended from property to person of incompetent: organ donation; Superintendent of Belchertown State School v. Saikewicz, 370N.E. 2d417, substituted judgment extended to personal life-or-death medical decision; In re Moe, 432N.E. 2d712, substituted judgment extended to sterilization of retarded.

[39]Superintendent of Belchertown State School v. Saikewicz, 370N.E.2d417.

Joseph Saikewicz, a sixty-seven year old retarded man with a mental age of about two-and-one-half years, suffered from terminal leukemia. Saikewicz's guardian ad litem, appointed at the request of Saikewicz's institution caretaker, recommended that the court authorize the withholding of chemotherapy. The Massachusetts Supreme Judicial Court affirmed the guardian's recommendation, relying upon a substituted judgment. In so doing, the court proceeded both without clear evidence of Saikewicz's past or present wishes and in the face of evidence that the majority of competent patients would elect chemotherapy. The court held that Saikewicz's retardation, which practically excluded the use of prior statements as in Eichner, also theoretically excluded the use of the Quinlan majority-sentiment rule.

Instead, the Massachusetts court chose to place itself in the awkward and perplexing position of attempting to specualte what an incompetent would choose, "if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person."[40] The image is that of an incompetent who becomes suddenly competent, but will shortly return to incompetency, and is aware of this. In the interim, he may analyze his past and future situation and decide for himself about the proposed treatment.

Despite the highly speculative nature of this inquiry, the court proceeded to analyze Saikewicz's situation. It reasoned that he would not understand

[40] Id. at 431.

the purposes of the treatment and would therefore resist it,[41] lessening its utility. Consequently, the whole experience would be traumatic[42] and without perceivable (to Saikewicz) benefit.[43] Hence, the court concluded, Saikewicz would decide against chermotherapy.

The highly problematic nature of the Saikewicz decision-both in terms of reasoning and result-point up the practical limits of substituted judgment. The Eichner case, with its uncontested testimony on precisely the question

[41] Apparently Saikewicz's caretakers make no effort to test his actual response to the therapy. Burt, supra note 4, at 157.

According to testimony in the case, chemotherapy would at best offer Saikewicz a 30-50% chance for remission, with remission lasting two-to-thirteen months. In light of his age, the court noted, Saikewicz's actual prognosis was somewhat worse. 370N.E.2d at 420-21.

[42] But see Schultz, supra note 8, at 945, "some studies have indicated that profoundly retarded persons are less sensitive to pain than the nonretarded" (footnote omitted).

[43] But see id. at 944, "impossible task of weighing the importance an incompetent person places on such value as life, pain, and security..

investigated by the court, presented an ideal of practical simplicity.[44] Any deviation from the Eichner fact pattern, however, presents the court with difficulties. If the patient's situation varies from a hypothetical situation he had discussed earlier, for example, the court must consider the importance of this variation. If, as in the Quinlan case, past statements are of dubious probative value, the court must rely upon more indirect and uncertain evidence.[45] When the incompetent not only leaves no evidence of his intent, but never even could formulate legally effective wishes, as in Saikewicz, the court must struggle

[44]In re Storar, 420N.E.2d64. Cf. Application of Lydia E. Hall Hosp., 455N.Y.S.2d706, patient refus ing treatment became incompetent during litigation.

[45]In re Quinlan, 355A.2d647. The court faces a situation akin to that of a court trying to determine legislative intent with respect to a case clearly not foreseen by the legislature.

with a complete absence of guiding factors. In such circumstances, efforts to ascertain the incompetent's intent are doomed from the start:[46] courts cannot attribute a legally conclusive intent to an incompetent without deriving that intent from sources external to the incompetent.[47] Substituted judgment requires the court to piece together testimony from relatives and

[46]See In re Storar, 420N.E.2d at 72-73, refusing to apply substituted judgment doctrine to congenital retardate; In re Moe, 432N.E.2d at 724(dissenting opinion), impossible to ascertain intent of life-long incompetent; substituted judgment therefore "a cruel charade".

[47]In re Spring, 405N.E.2d115, provides a particularly striking example. The seventy-nine year old Spring "acquiesced in hemodialysis treatment...for several months" before his wife and son decided he was incompetent. Id. at 120. The court, relying heavily on the opinions of the wife and son, granted them authority to discontinue the dialysis. Id. at 122-23. Spring, meanwhile, expressed to a doctor and nurse his opposition to discontinuance. The nursing home followed Spring's expressed(incompetent?) wishes instead of the wishes the court attributed to him, and continued treatment. Subsequently Spring died, and his wife sued for and received a $2.58 million judgment against the nursing home, apparently for noncompliance with the court order.

acquaintances to construct a persona who then represents and decides for the incompetent. The entire endeavor appears more an exercise in fictional characterization than an enhancement of rights.[48]

The underlying problem of perspective further complicates the task of reconstructing the mind of the incompetent. No one can entirely exclude his own perspective on the incompetent while attempting to adopt the incompetent's point of view.[49] Handicaps, for example,

[48]Cf. In re Conroy, 486A.2d at 1231, "[i]n the absence of adequate proof of the patient's wishes, it is naive to pretend that the right to self-determination serves as the basis for substituted decisionmaking." Annas, Quality of Life in the Courts: Earle Spring in Fantasyland, HASTINGS CENTER REPORT, Aug. 1980, at 9,10, substituted judgment in"invention from fantasyland". But see In re Boyd, 403A.2d744,751 D.C.1979), concluding that the uncertainties of substituted judgment are within acceptable limits.

[49]Robert Burt has described the additional danger of unconscious destructive impulses being loosed in these situations. Burt, supra note 9. Neither judge nor litigant, Burt explains, can assume the place of the incompetent without constructing a conflict between his own identity

can scarcely ever, if at all, be perceived equally by those who bear them and by third parties.[50] Many a person has imagined that death would be preferable to a certain illness, deformity, or disability, only to find an unsuspected capacity to deal with the handicap when it eventuates. This consideration applies not only to third party decisions for incompetents, but also to advance provisions individuals make and the identity of the incompetent. This ambiguity of identities threatens the competent person's image of himself as a competent person. Since the incompetent offers no assistance in maintaining the two as distinct personalities, the competent person feels an unconscious desire to wipe out this threat to his own, individual psychic integrity. Id. at 28-30. A simple example of this phenomenon in an analogous situation is the rage which quickly wells up in someone who talks to another and receives no response or acknowledgment.

[50]A genetic counselor, for example, was "startled" to find that "[t]he congenitally blind don't regard it as all that much of a handicap," and were not particularly concerned about blindness in their children. Wingerson, Genetic Twilight, SCI. DIG., June 1983, at 98,99. See also Schultz, supra at 946, handicaps appear differently to handicapped persons.

for themselves while still competent. Thus, even practically easy cases of substituted judgment, as in Eichner, entail the application of past intents which, despite their solemnity, may no longer be appropriate.

Contextual Problems

The substantial practical and theoretical problems associated with the substituted judgment doctrine gain magnified significance in the pressured context of a life-or-death-situation. A heavy emotional overlay, conflicting motives, and the basic tension of a confrontation with death,[51] all beleaguer the participants in litigation and make the need for a carefully chosen legal standard especially important.[52]

[51]One commentator suggests that "[d]eath is nothing but dreadful to any human being; it is not a fact of life negotiable or manageable like other facts". Ramsey, Death's Pedagogy, in DEATH, DYING, AND EUTHANASIA 331,336(D.Horan & D.Mall eds. 1980).

[52][T]he exercise of judicial discretion unguided by well thought-out policy determinations

This highly pressured context typically precludes the careful consideration of legal standards. Decisions often must issue quickly, almost instinctively, when the passage of days or even hours irreversibly alters the patient's prognosis. The court may thus feel obliged to decide the case immediately and perhaps supply a reasoned justification only at some later date.[53] Appellate review ordinarily would allow for the scrupulous reconsideration of trial court edicts. But life-or-death cases

reflecting the interest of society, as well as the [incompetent], [is] hazardous indeed." In re Guardianship of Eberhardy, 307 N.W.2d at 895, refusing to authorize sterilization of retarded woman. See generally Burt, supra.

[53]In the Saikewicz case, for example, the court issued its order July 9, 1976, 370N.W.2d at 422, but the case was not decided until November 28, 1977. In the meantime, scholars were left guessing as to the basis for the ruling. See Kindregan, supra note 19; Schultz, supra note 20; Brant, The Right to Die in Peace: Substituted Consent and the Mentally Incompetent, 11 SUFFOLK U.L. REV. 959(1977) [hereinafter cited as Brant]. In such a situation the ultimate opinion is more likely a rationalization of the decision than basis for it.

frequently become moot before appeals courts can hear them, and even if time allows for an appeal, this higher court decision may be made under the same pressures which bore upon the lower court.

These contextual pressures pose a very real threat to the incompetent, since the litigation contains a systematic bias against treatment: incompetents cannot by themselves litigate their medical treatment, and caretakers who do not strongly desire the withholding of treatment will not bring an action either. Hence, only those incompetents whose death accords with the interests of the litigant will appear before a tribunal. The whole treatment question, then, appears in litigation not in an atmosphere of concerned, impartial inquiry, but imbued with a strong desire for the nontreatment and consequent

death of the incompetent.[54] In this environment of inherent antagonism to the incompetent, the need for special safeguards becomes critical.[55]

Recognition of the dangers inevitably surrounding life-or-death treatment decisions for incompetents gives a new perspective on substituted judgment

[54]"I think it is fair to say that everyone involved in this case wishes that this poor woman would die." In re Conroy, 457A.2d at 1234, authorizing removal of nasogastric feeding tube. Litigants may be expected in most cases to deny a desire for the death of the incompetent, and to focus instead on the undesirability of the specific treatment in dispute, but they must understand the probable consequence of withholding treatment-otherwise there would be no need to seek advance legal immunity.

[55]Professor Jay Katz of the Yale Law School raises the possibility that an attorney be assigned automatically to such cases for the sole purpose of arguing for the incompetent's life. Jay Katz, Personal Communication (May 29, 1983). Such an amicus vitae could, with due authorization from the state, prove a valuable advocate of the incompetent's right to life, and thus provide balance to potentially one-sided proceedings. See Kindregan, supra note 19, at 929-32, need full adversarial proceeding to avoid abuses. See also In re Guardianship of Eberhardy, 307N.W. 2d at 895, noting lack of truly adversarial hearing in sterilization case for incompetent.

doctrine. The standard becomes a means, not of effectuating the incompetent's personal choice, but of enabling a caretaker to dispose of the incompetent, while soothing his conscience, or that of the court, with the language of rights.[56] If any right is vindicated, it is the right of the caretaker to choose death for the incompetent.[57]

[56]Naturally the problems of self-interested caretakers, hasty judgments, and a generally high-pressure situation are essentially systematic, and thus afflict any standard employed to handle important medical decisions for incompetents. The substituted judgment approach remains especially susceptible to abuse; however, it is always easier to explain away questionable results by appealing to the quirky nature of personal rights and choices than it would be to explain, for example, that a reasonably prudent person would so act.

[57]Hence the attractive rhetoric of the substituted judgment doctrine becomes in itself dangerous. With the death of incompetents phrased in the esthetic terminology of rights, pressures may easily increase for the exercise of these rights. A family that feels a heavy financial or emotional burden in caring for an incompetent, for example, no longer rests upon the firm support of the law. Instead a legal option appears before their eyes offering both removal of the burden and moral justification. The family that would never dream of harming old Aunt Matilda now seriously considers allowing her the exercise of her right to discontinue nasogastric feeding.

The fundamental defect of substituted judgment doctrine is that it claims to be something other than what it is. Its attractive language proclaims the vindication of important personal rights, but, in operation, it serves

The family is free of her, her constitutional rights are vindicated, and she starves to a legally-protected death. See In re Severns, 424A.2d at 160, ordering feeding tube not to be used; Barber v. Superior Court, 195 Cal Rptr. 484, physicians not criminally liable for intentional starvation/dehydration of permanently vegetative patient; In re Hier, 18 Mass. App. Ct. 200, 464N.E.2d959(1984), refusing to authorize surgery, although such surgery only realistic alternative to supply adequate nutrition to incompetent; In re Conroy, 486A.2d1209, where certain standards are satisfied, withholding artificial feeding is acceptable. There may even arise special pressures on the institutional caretaker to dispatch incompetents in order to preclude damage suits for the violation of substituted judgments rights. See, e.g., Estate of Leach v. Shapiro, 13 Ohio App.3d393,469N.E.2d 1047(1984), cause of action exists for wrongfully placing and maintaining a patient on life-support systems.

These pressures need not only bear down upon the caretakers of incompetents. Competent individuals themselves suffering disabilities may feel subtle and not-so-subtle promptings to exercise their "rights". See, e.g., the case of David G, discussed in Burt, supra note 4, at 15-20. See also Going Gentle into that Good Night, Time, March 21, 1983, at 85, noting pressure for sick and elderly to commit suicide.

as merely another method of deciding what to do with helpless incompetents.[58] The appealing rhetoric makes it an especially potent decisional instrument; meanwhile this same rhetoric largely shields the outcome from criticism.

It has been argued that flaws in rhetoric need not hinder the decision of a case, since the result is more important than the reasoning behind it,[59] but the rationale matters a great deal, since its effect outlives the individual result. The danger is not

[58]Again, alternative standards are often subject to similar criticisms. The point is that substituted judgment is no better, and may be considerably worse, than the alternative standards.

[59]In re Guardianship of Eberhardy, 307N.W.2d at 913(dissenting opinion), on sterilization:

> In the final analysis, it is unimportant whether the justification for state intrusion is that the choice is really that of the incompetent merely exercised by a substituted competent entity, or that the choice, as the state's choice, is made in the best interests of the incompetent and, as such, best vindicated her constitutionally protected rights. What is important is that the choice be made.

only that the case formulating the specific theory will turn out improperly, but also that future opinions will borrow ambiguous or deceptive language to create a whole new line of cases. In precisely this fashion the substituted judgment standard evolved, beginningin one case with language added, almost as an afterthought, to demonstrate the reasonableness of the result, and ultimately developing into a central principle of decision-making.[60] Since the doctrine remains theoretically unbounded, attorneys and courts will probably continue to extend and reshape the principle to establish still greater control over the lives and deaths of incompetents.[61]

[60]See, e.g., Guardianship of Roe, 421N.E.2d at 51, right to refuse treatment requires judicial exercise of substituted judgment on behalf of incompetent.

[61]See Note, The Substituted Judgment Doctrine Expands Beyond Life-Prolonging Decisions, 5W.NEW ENG. L. REV. 565,585-86(1983), noting virtual limitlessness of potential for applying substituted judgment doctrine.

Evaluation and Rejection of Substituted Judgment Doctrine

In the effort to find a more satisfactory decisional standard, it may be helpful to consider broadly the ends sought in resolving medical decisions for incompetents. The extent to which substituted judgment doctrine satisfies-or fails to satisfy-these goals might offer clues for a more desirable solution.

The substituted judgment doctrine, with its emphasis on rights, does not directly address the public policy considerations involved in the treatment of incompetents. These concerns include, for example, the potentially conflicting desires to uphold the value of human life and to conserve economic resources. Insofar as substituted judgment permits or encourages the death of incapacitated and hence less-producing, higher-consuming individuals, the goal of efficient resource management gains at the expense of the perceived intrinsic value of the lives of these individuals. Since courts are not required by the doctrine to decide in favor of nontreatment, however, the doctrine does not achieve a systematic reallocation of resources, while it uniformly diminishes the value of human life.

Substituted judgment doctrine does claim to enhance human dignity and freedom and thus to accord with two major public policy aims.[62] The permissive death of incompetents, however, could just as readily appear as degrading and oppressive to a whole class of humans and, indirectly, to the rest

[62] See, e.g., In re Boyd, 402A.2d at 750; Guardianship of Roe, 421N.E.2d at 51; In re Guardianship of Eberhardy, 307 N.W.2d at 913(dissenting opinion).

of the people. In this light, the doctrine could militate strongly against public policy. Which of these two conflicting perspectives prevails may hinge on the question whether and to what extent substituted judgment doctrine safeguards the concerns of the individual incompetent.

Personal concerns for the incompetent include the advancement of his best interests and the defense of his well-being in the face of threatened harm, as well as the preservation of personal rights. Substituted judgment doctrine places primary emphasis upon the last of these. Since substituted judgment exalts the incompetent's putative wishes over his best interests, it allows for decisions contrary to these best interests. Likewise, to the extent that a competent individual may choose to subject himself to harm or death,

the doctrine permits the incompetent to do so as well. Thus, substituted judgment offers no particular protection for the interests or the well-being of the incompetent.

Nor does the standard offer support for the personal rights of the incompetent. Substituted judgment doctrine does claim to offer effective, indeed unique protection for these rights, but, as noted earlier, the will of the incompetent is both practically and theoretically inscrutable, and the unthinking, literal application of decisional rights to incompetents is simultaneously inappropriate and unfaithful to the content of these rights. Indeed, the attention paid to these illusory "rights" masks the actual degradation of the incompetent's rights to life and equal protection.[63]

[63]Substituted judgment doctrine singles out incompetent individuals for official, involuntary

Probing scrutiny of the substituted judgment doctrine, then, reveals it to be a deceptive device allowing for the exploitation of incompetent dependents. The doctrine offers false benefits and hidden harms, and rests on a specious theoretical base. The substituted judgment standard[64] should be rejected as a dangerous sham.[65]

death. But see Conservatorship of Valerie N., 199 Cal. Rptr. 478, prohibiting court authorization of sterilization of incompetents does not violate equal protection, since incompetents cannot give informed consent.

[64]Rejection of only the rights language and rights foundation of the substituted judgment doctrine would essentially defuse the standard by destroying its central appeal. Since the very notion of implementing the reconstructed wishes of the incompetent carries with it a potential for exploitation and the evasion of responsibility.

[65]"Under no circumstances should a court consider such subjective factors as the quality of a person's life or speculate as to what the patient would want if he had the capacity to choose." Schultz, supra note 20, at 949. For a concise, powerful criticism of substituted judgment doctrine, see Note, supra note 30.

COMPARISON BETWEEN RELIEF SOUGHT BY APPELLANTS AND RELIEF PERMISSIBLE UNDER LAWS OF THE 50 STATES

Nearly all states have living will legislation and power of attorney legislation, permitting substituted judgement under specified circumstances. In the present case, what is sought by appellants is the finding under an unenumerated Federal Constitutional Right and furthermore under a plurality of fictions is the right to kill Nancy Cruzan by cutting off her nutrition, thereby causing her to starve to death, based on their present wishes and off hand statements by Nancy which would not be admissible for most legal purposes.

The following applies to laws passed by legislatures of the various states and the District of Columbia. No state would permit the alleged statements of Nancy

Cruzan to be admissible for the vast majority of possible legal purposes. No state has passed a law permitting persistent vegetative or coma patients to be killed. No state law approves starvation as a form of treatment. No state law equates nutrition and hydration with medical care. No state law equates substituted judgement generally with judgement of a person. Substituted judgement is limited.

CONCLUSION

The case should be affirmed.

DATED: October 1, 1989

Respectfully submitted,

ROBERT L SASSONE, Attorney for amicus

NO 88-1503
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NANCY BETH CRUZAN, BY HER PARENTS AND CO-GUARDIANS, LESTER L AND JOYCE CRUZAN
Petitioners,
v.
DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, AND ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,
Respondents,
v.
THAD C. McCANSE, GUARDIAN AD LITEM,
Respondent.

Affidavit of mailing of amicus brief copies, Rule 28.2

State of California }ss.
City of Santa Ana, County of Orange }

Robert L Sassone, being first duly sworn on his oath deposes and says:

Robert L Sassone is a member of the bar of the United States Supreme Court admitted October 26, 1971. To his knowledge, on October 11, 1989, within the particular time and permitted time for serving of said amicus brief pursuant to Rule 28.2, he deposited in the United States Mailbox at Santa Ana, CA 92701 pursuant to Rule 28.2 with first class postage prepaid 40 copies of the attached amicus brief in the present case properly addressed to the Clerk of the United States Supreme Court and three copies of said amicus brief to each party addressed as follows:

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Subscribed and sworn to before me on
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Lawrence D Sassone, Notary Public